# In the Supreme Court

## of the United States

OCTOBER TERM, 1977

No. 77-952

GROUP LIFE AND HEALTH INSURANCE COMPANY, also known as BLUE SHIELD OF TEXAS, et al.,

*Petitioners,*

v.

ROYAL DRUG COMPANY, INC., doing business as ROYAL PHARMACY OF CASTLE HILLS, and DISCO PHARMACY, et al.,

*Respondents.*

*On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit*

**AMICUS CURIAE BRIEF OF THE PORTLAND RETAIL DRUGGISTS ASSOCIATION, INC., an Oregon nonprofit corporation**

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By consent of the parties the Portland Retail Druggists Association, Inc. files this brief as *amicus curiae* in support of Respondents.

## INTEREST OF THE AMICUS CURIAE

The Portland Retail Druggists Association, Inc. ("PRDA") was the partially prevailing Respondent in *Abbott Laboratories* v. *Portland Retail Druggists Assn., Inc.*, 425 U.S. 1 (1976), which construed the 15 U.S.C. § 13c nonprofit institutions exemption to the Robinson-Patman Act, 15 U.S.C. §§ 13, et seq.

*Abbott* and the case at bar both involve drugs and the extent of exemption from the antitrust laws of activity in drugs.

This Court's decision in the case at bar will affect an antitrust case in which the PRDA is the plaintiff: *Portland Retail Druggists Association, Inc.* v. *Kaiser Foundation Health Plan, et al*, U.S.D.C. C.D. Cal., Civil No. 77-1458-IH.

On January 23, 1978, said complaint and a companion complaint were dismissed from the bench by the Honorable Irving Hill, U. S. District Judge, on the ground, among others, that defendants' drug purchases at preferential prices were exempt from the antitrust laws by the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 ("the Act").

The PRDA believes that the Fifth Circuit decision before this Court is a correct statement of the law and that cases and arguments relied upon by Petitioners and their *amici* are based on an erroneous construction of the Act.

The PRDA submits that if Petitioners prevail,



"nonprofit" and for-profit insurance companies and health care providers will have a license to boycott, coerce and intimidate, and to monopolize goods and services financed by insurance and health care premiums, to the injury of competition, subscribers and the general public.

## QUESTIONS PRESENTED

1. Does the McCarran-Ferguson Act authorize a health care provider to compel its subscribers to purchase drugs exclusively from designated suppliers or forego the drug "benefit" paid for by the subscriber and/or his employer?

2. In the absence of a specific enabling state statute, does the McCarran-Ferguson Act authorize a health care provider to compel its subscribers to purchase drugs exclusively from designated suppliers or forego the drug "benefit" paid by the subscriber and/or his employer?

3. Does the business of insurance under the McCarran-Ferguson Act include the designation by a health care provider of the exclusive sources of drugs to be obtained by subscribers pursuant to the drug "benefit" provisions of their contracts?

4. Does the business of insurance include goods —in this case, drugs—financed pursuant to a health care contract?

## SUMMARY OF ARGUMENT

Statutory exemptions to the antitrust laws are to be strictly construed against any claimed exemption, and this principle applies to the McCarran-Ferguson Act.

Good motives or intent are not a defense to violation of the antitrust laws.

No Texas statute or regulation authorizes a health care provider to discriminate against a non-discriminating pharmacy and a health care subscriber who exercises his freedom of choice to patronize a non-participating pharmacy.

In enacting the McCarran-Ferguson Act the Congress did not intend to include goods and services as part of the business of insurance.

Petitioners can contain the cost of drugs without violating the antitrust laws.

**Statutory exemptions to the antitrust laws are to be strictly construed against any claimed exemption, and this principle applies to the McCarran-Ferguson Act.**

The antitrust laws are to be construed liberally and exemptions from their application are to be construed strictly against the claimed exemption. *Abbott Laboratories* v. *Portland Retail Druggists Assn., Inc.*, 425 U.S. 1, 11 (1976).

Thus this Court ruled in favor of competition in *St. Paul Fire & Marine Insurance Co.* v. *Barry*, —



U.S. —, 38 CCH S. Ct. Bull. p. B4089, decided June 29, 1978.

**Good motives or intent are not a defense to violation of the antitrust laws.**

Much of the *amici* briefs siding with Petitioners harp on the good motives of Petitioners and claim that affirmance of the Court of Appeals will work a hardship on health care providers and their subscribers. Similar rationalizations favoring vitiation of the federal antitrust laws offered by Petitioners' *amici* were rejected by this Court in *St. Paul Fire & Marine Insurance Co.* v. *Barry, supra.*

It cannot be emphasized too strongly that the scheme struck down by the Court of Appeals foreclosed competition among providers of drugs. In theory the scheme allowed a subscriber to obtain a drug covered by the pharmacy benefit from the pharmacy of his or her choice, but the discrimination effectively discouraged obtaining of the drugs from any but a participating pharmacy.

Petitioners discriminate against a non-participating pharmacy and any subscriber who purchases drugs from a non-participating pharmacy, to the detriment of the subscriber's freedom of choice, to the partial denial of his pharmacy benefit, and the foreclosure of competition in the sale of drugs and drug-related services. *Royal Drug Co.* v. *Group Life & Health Ins. Co.*, 556 F2d 1375, 1379 (5th Cir. 1977) details the discrimination.

Assuming *arguendo* some "savings" to subscribers were reflected in lower premiums (and the record appears silent on this point) good intentions, "savings" and similar rationalizations are not a defense to violation of the antitrust laws.

*United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 610 (1972) held:

> "Antitrust laws in general and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.
>
> (no paragraph)
>
> And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster.
>
> (no paragraph)
>
> Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy. . . ."

Also see *Albrecht* v. *Herald Company*, 390 U.S. 145, 154 (1964). In the case at bar the Petitioners seek judicial approval of the foreclosure of competition for the alleged benefit of subscribers.



If Petitioners prevail the major beneficiaries will be the stockholders of the for-profit insurance companies and the "captive" and other designated suppliers of insurance premium-financed goods and services.

**No Texas statute or regulation authorizes a health care provider to discriminate against a non-participating pharmacy and a health care subscriber who exercises his freedom of choice to patronize a non-participating pharmacy.**

Implicit in the insurance codes of the various states is the doctrine of protecting the insurer against loss and discrimination, *e.g.:*

> "The Legislative Assembly declares that the Insurance Code is for the protection of the insurance-buying public." (§ 731.008, Oregon Revised Statutes).

Petitioners and their *amici* do not cite the Texas definition of the business of insurance in *Tex. Ins. Code Ann.* Art. 1.14-1, § 2 (Supp. 1977).

The comprehensive statute does not identify goods and services as part of the business of insurance.

The statutory omission is evidence of legislative intent to exclude goods and services from regulation as insurance.

**In enacting the McCarran-Ferguson Act the Congress did not intend to include goods and services as part of the business of insurance.**

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The McCarran-Ferguson Act was passed in reaction to this Court's decision in *United States* v. *South-Eastern Underwriters Assn.*, 322 U.S. 533 (1944) to give support to the then existing and future state systems for regulating and taxing the business of insurance. *St. Paul Fire & Marine Ins. Co.* v. *Barry, supra,* at B4097-98.

Petitioners and their *amici* do not cite any legislative history to support their claim that the Act includes goods and services.

Petitioners apparently concede that provision for drugs was not within the contemplation of Congress during the deliberations leading to the Act:

> "The insurance program here in issue had its origins in 1967 . . . ." (Br. for Pet. 6).

Applicable to the case at bar is this Court's ruling in *Abbott Laboratories* v. *Portland Retail Druggists Assn., Inc., supra,* at 425 U.S. 1, 13:

> ". . . there is nothing in the Act that indicates that its exemption provision is to be applied and expanded automatically to whatever new venture the nonprofit hospital finds attractive in these changing days. The Congress surely did not intend to give the hospital a blank check. Had it so intended, it would not have qualified purchases by nonprofit institutions in the way it did in § 13c. . . . ."

Similarly, Congress did not give insurance companies "a blank check" to violate the antitrust laws



with impunity. The legislative record is to the contrary.

To paraphrase *Abbott Laboratories* v. *Portland Retail Druggists Assn., Inc., supra,* at 425 U.S. 14:

> We therefore conclude that the exemption of the Act as a limited one; that just because it is an insurance company does not mean that all its activities are exempt from the antitrust laws; that the test is the obvious one inherent in the language of the statute, namely the "business of insurance;" and an insurance company's discriminatory provisions for goods and services are not the "business of insurance" under the Act.

The essence of insurance is the underwriting of risks in exchange for a payment by the insured and money payment to the insured for insured losses.

This Court held that a merger of insurance companies approved by the Arizona Insurance Commissioner was not exempt from Securities and Exchange Commission action under the Act: *Securities and Exchange Commisison* v. *National Securities, Inc.*, 393 U.S. 397 (1969).

Other alleged insurance company activities similarly have been held outside the Act:

*Zelson* v. *Phoenix Mutual Life Insurance Company*, 549 F.2d 62 (8th Cir. 1977)

*Battle* v. *Liberty National Life Insurance Company*, 493 F.2d 30 (5th Cir. 1974)

*Ray* v. *United Family Life Insurance Company, Inc.*, 430 F. Supp. 1353 (N.C. 1977)

*American Family Life Assurance Company of Columbus* v. *Planned Marketing Associates, Inc.*, 389 F. Supp. 1141 (Va. 1974)

*Hill* v. *National Auto Glass Co.*, 293 F. Supp. 295 (N.D. Cal. 1968)

*Continental American Life Insurance Company* v. *City of Wilmington*, 273 A.2d 277 (Del. Super. 1970)

**Petitioners can contain the cost of drugs without violating the antitrust laws.**

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Petitioners and various of their *amici* argue that containment of costs is part of the business of insurance exempt under the Act, but cite no relevant statute or legislative history of the Act.

Control of or reduction of costs of insurance has never been deemed an excuse to violate the antitrust laws.

Petitioners have available traditional and other legal methods of reducing their financial exposure to the cost of drugs provided pursuant to a drug benefit, *e.g.*, a limit on the drugs covered by the benefit, a dollar maximum on the amount of drugs purchased.



## CONCLUSION

The Court of Appeals should be affirmed.

Respectfully submitted,

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